Office - Supreme Court, U.S.
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DEC 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-504

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case raises questions as to the validity of certain aspects of the FCC's end-user access charge plan, which provides for the recovery of a part of the cost of local telephone company equipment. A large portion of that equipment is used for both intrastate and interstate service; part of the cost of such equipment is "non-traffic-sensitive" — *i.e.*, does not vary with extent of use. The Commission has adopted a plan pursuant to which most of the portion of these non-traffic-sensitive costs that is allocated to the "interstate jurisdiction" will be recovered through a flat access fee payable by all telephone subscribers, whether or not the particular subscriber makes interstate calls.

The questions presented by the petition are:

(1) Whether this end user access charge plan is consistent with *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 113 (1930).*

(2) Whether the Commission's use of notice and comment rulemaking in this proceeding afforded the "full opportunity for hearing" required as a predicate for certain Commission actions under Section 205(a) of the Communications Act, 47 U.S.C. 205(a).

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*The first question presented by the instant petition is the same as that presented by the petition in No. 84-95, *National Ass'n of Regulatory Utility Commissioners* v. *FCC*, which also seeks review of the judgment of the court of appeals challenged here. We have discussed that issue in our response in No. 84-95, and accordingly confine this response to the second question presented.

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OPINIONS BELOW

The opinion of the court of appeals (84-95 Pet. App. 1a-110a) is reported at 737 F.2d 1095.[1] The orders of the FCC are reported at 93 F.C.C. 2d 241 (Report and Order), 48 Fed. Reg. 42984 (1983) (Order on Reconsideration), and 49 Fed. Reg. 7810 (1984) (Order on Further Reconsideration).

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. The petition for a writ of certiorari was filed on September 7, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

[1]Hereinafter "Pet. App." denotes the appendix to the petition for a writ of certiorari in the related case, No. 84-95. See page i note *, *supra*.

STATEMENT

This case, like *National Association of Regulatory Utility Commissions* v. *FCC*, No. 84-95, arises from rulemaking proceedings undertaken by the Federal Communications Commission to determine, inter alia, how local telephone companies should recover the "interstate" portion of the fixed costs of those local exchange facilities that are used both for interstate and intrastate telephone service.[2] In the first phase of these proceedings, commenced in 1978, the Commission concluded that an open market structure and free competition in the interstate telecommunications industry would serve the public interest and advance the policies of the Communications Act. Then, in a series of orders generally known collectively as the "*Access Decision*," the Commission endorsed a new system of fixed monthly charges to allow recovery, directly from telephone subscribers, of most of the interstate share of the costs of non-traffic-sensitive jointly-used local exchange facilities. But the Commission did not actually approve tariffs or fix rates for any class of telephone subscribers in the *Access Decision*. Indeed, tariffs imposing end-user charges on residential and single-line business users have yet to become effective. Access charge tariffs for multiple-line business service have gone into effect, but are presently under review in separate Commission proceedings. The only actual dollar amount finally established as part of the *Access Decision* is a *ceiling* of $6 per month for multiple-line business service access charges.

The Commission rendered its *Access Decision* orders at the close of five years of study of the underlying issues and the comments of interested parties. The scope of the inquiry was defined by a notice of inquiry and proposed rulemaking

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[2]The pertinent technical and regulatory background is described in the government's brief in opposition in No. 84-95.

and four supplemental notices. At least 85 parties, including petitioners, filed written comments at some stage of the proceeding. These comments were analyzed and addressed by the Commission in its Report and Order. The Commission then entertained petitions for rehearing, issued an order on reconsideration, accepted further rehearing petitions, and entered an order on further reconsideration.

Numerous petitions for review of the Commission's *Access Decision*, raising a wide variety of claims, were filed in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals affirmed the agency's action in all but minor respects. Specifically, as explained in our brief in No. 84-95 (at 5-6), the court of appeals rejected the claim, advanced here, that the Commission's ruling is inconsistent with *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). In addition, the court of appeals rejected (Pet. App. 52a-56a) petitioners' argument that either Section 205(a) of the Communications Act, 47 U.S.C. 205(a), or longstanding agency procedures, departure from which was impermissible, required the Commission to undertake a trial-type evidentiary hearing as the predicate for the rulings under review. The court found no general requirement for trial-type hearings in Section 205(a), emphasizing that whatever procedure might be required in an adjudicatory proceeding to determine whether a particular carrier's rate is lawful, no trial-type hearing was required as a basis for the *Access Decision*, because (Pet. App. 54a)

> the FCC prescribed no specific revenue requirement and did not determine the legality of specific rates. On the contrary, the Commission initiated broad-gauged rulemaking to develop policies for the interstate long-distance market and it set prospective, policy implementing rules.

The court of appeals also observed that no Commission precedent or longstanding practice reflects any requirement for a trial-type hearing in a proceeding similar to that undertaken in this case (Pet. App. 54a-55a).

ARGUMENT

No question that warrants further review is presented by the procedures employed by the Commission culminating in its *Access Decision*. The decision of the court of appeals sustaining the agency's procedures does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioners do not assert otherwise. Rather their claim is simply that "prior FCC and D.C. Circuit cases * * * mandate a trial type evidentiary hearing" in the circumstances of this case (Pet. 20; see also Pet. 29).[3]

1. Section 205(a) of the Communications Act, 47 U.S.C. 205(a), authorizes the Commission to prescribe charges, classifications, regulations and practices "after full opportunity for a hearing." Petitioners' claim is that the Commission was required to hold a trial-type evidentiary hearing in this case. Yet petitioners do not suggest that the statutory language on its face requires anything more than a timely opportunity to be heard such as was afforded by the notice and comment rulemaking procedures employed here. Nor would any such claim be tenable in the face of *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973), and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), which make clear that a bare statutory requirement that a "hearing" precede agency action does not mandate use of trial-type procedures. See, *e.g. Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 653 F.2d 544, 551 (D.C. Cir. 1981); *Mobil Oil Corp.* v. *Federal Power Comm'n*, 483 F.2d 1238, 1250 (D.C. Cir. 1973). Nor do

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[3]See page i note *, *supra*.

petitioners claim that pertinent legislative history supports their reading of the hearing requirements of Section 205(a).

Petitioners' claim that trial-type hearing procedures were required here is based solely upon the assertion that it is supported by decisions of the United States Court of Appeals for the District of Columbia Circuit and of the FCC (Pet. 20, 29).[4] Petitioners' contention is both irrelevant and unfounded. It is irrelevant because this Court does not sit to resolve intracircuit (much less intra-agency) conflicts, and because administrative agencies are free to revise their views on legal questions, including procedural ones, in the light of their experience. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 25; *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 7-8; *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978). Moreover, absent a constitutional or statutory basis for requiring the use of trial-type procedures, the courts are generally without authority to force a particular " 'method[] of inquiry' " upon the agency. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 543 (1978) (citation omitted).

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[4]Petitioners attempt (Pet. 21) to distinguish this case from *American Telephone & Telegraph Co.* v. *FCC*, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978), which held, in an analagous context, that notice-and-comment rulemaking procedures satisfied the requirements of Section 205(a), and which the court of appeals below cited as consistent with its decision (Pet. App. 53a). But petitioners do not even suggest that the Second Circuit's decision supports their contentions here. In any event, even petitioners' more modest contention, that the Second Circuit case is distinguishable, is unfounded. Petitioners assert that the earlier case is distinguishable because it dealt with a Commission proceeding to regulate practices rather than actual rates (Pet. 21). But, on its face, Section 205(a) applies the very same hearing requirement to rate regulation and regulation of practices.

Petitioners' contention that the Commission and the court of appeals have deviated from their own precedents regarding the requisites of the statutorily mandated hearing is, in any event, incorrect. *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975), on which petitioners place primary reliance (Pet. 22-23), is wholly inapposite. There the court of appeals simply commented that the hearing requirement of Section 205(a) had been satisfied. Although a formal evidentiary hearing had been held, the Court did not address the question whether that kind of procedure was required by Section 205(a). Similarly, nothing in the Commission's opinion in *In re AT&T*, 61 F.C.C. 2d 587 (1976), aff'd in part *sub nom. Aeronautical Radio, Inc.* v. *FCC*, 642 F.2d 1221 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981), addressed the questions whether, or in what circumstances, notice-and-comment procedures satisfy the hearing requirement of Section 205(a).[5]

2. Petitioners' contentions are based largely upon a mischaracterization of the Commission's proceedings. In petitioners' view, the Commission's *Access Decision* effects a "prescription of rates and revenue requirements" (Pet. 17; see also *id.* at 25). But in the proceeding under review the Commission did not approve tariffs or fix rates to be charged by any particular carrier or to be paid by any particular class of telephone subscribers. Instead, the Commission simply determined the structure of the system under which *all* local telephone operating companies are to recover the interstate portion of the cost of non-traffic

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[5]Moreover, both *Nader* and *In re AT&T* grew out of Commission proceedings to prescribe or review an actual rate of a particular carrier, rather than proceedings to fashion broad policies applicable to an entire industry. Thus, to the extent that those cases might be interpreted as suggesting that Section 205(a) requires an evidentiary hearing in the former class of cases (see pages 7-8, *infra*), they provide no support for requiring a formal evidentiary hearing in the instant case.

sensitive local plant equipment from subscribers generally. The Commission determined, as a matter of general policy, that these costs should be recovered in substantial part through flat access charges paid by telephone subscribers. The precise amount of the charges was not determined for any class of service in the proceeding under review; moreover, the only final determination affecting the actual level of the tariffs to be entertained subsequently was that the access charge for multi-line business service should not exceed $6 per month. Actual charges will be determined in subsequent proceedings in which rates filed by various carriers are subject to review. Accordingly, the court of appeals correctly determined (Pet. App. 54a) that the Commission had not "determine[d] the legality of specific rates" and had, instead, properly engaged in "rulemaking to develop policies for the interstate long—distance market" leading to adoption of "prospective, policy-implementing rules."[6]

Given the nature of the proceeding at issue, petitioners' contentions are contrary to *Florida East Coast Ry., supra.* There the Court upheld the Interstate Commerce Commission's promulgation, on the basis of notice-and-comment rulemaking, of certain incentive per diem charges to be paid by carriers for the use of another carrier's box cars, "applicable across the board to all of the common carriers by

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[6]Notwithstanding the facts that we have summarized here, petitioners insist (Pet. 28) that "multi-line business end users currently paying a flat interstate access fee of $6.00 per line" would "disagree with the D.C. Circuit's assessment" of the nature of the proceedings. But nothing in the *Access Decision* requires carriers to charge an access fee of $6/month or binds the Commission to approve a rate of $6 in every case; indeed, rates filed by individual carriers have in many instances been substantially below the $6 ceiling. Because petitioners do not suggest that the $6 ceiling is too *low*, they cannot argue that the *Access Decision* forecloses case-by-case consideration of actual rates filed within the policy framework created by the *Access Decision.* Thus they do not challenge the one dollar-specific aspect of the *Access Decision.*

railroad subject to the Interstate Commerce Act" (410 U.S. at 246). There, as here, the issue confronted by the administrative agency (a nationwide chronic shortage of freight cars due to the lack of financial incentives for each carrier promptly to return box cars belonging to other carriers) affected the operations of the entire industry. The Court held that the applicable hearing requirement (contained in the Interstate Commerce Act) was satisfied in these circumstances by the rulemaking procedures employed by the Commission (410 U.S. 245-246):

> [T]he incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances.

The resulting agency action was characterized as "formulation of a basically legislative-type judgment, for prospective application only, rather than * * * adjudicati[on of] a particular set of disputed facts" (*id.* at 246). The Federal Communications Commission's *Access Decision*, the product of notice-and-comment rulemaking, likewise satisfies the applicable statutory hearing requirement.

3. Petitioners contend (Pet. 19-20, 29) finally that further review is warranted in this case because of the practical importance of the Commission's *Access Decision*. But we are unaware of any authority that suggests that statutory hearing requirements vary according to the perceived practical importance of the matter under consideration. To the extent that petitioners' argument for further review depends upon their disagreement with the Commission's policy judgments and is divorced from the issue presented for review, we urge, as we did in No. 84-95 (Gov't Br. in Opp. 12 & n.5), that the issue is committed to the political branches

of government. Deference to the political branches is especially appropriate here because of the close scrutiny the Commission's *Access Decision* has received at the hands of Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1984

DOJ-1984-12